U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 August 2006

In the Matter of:

J. S.,
Claimant,

v. **Case No.: 2004-BLA-05467**

F & D COAL COMPANY/
KENTUCKY COAL PRODUCERS
SELF INSURANCE FUND,
Employer/Carrier, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances:

Mark L. Ford, Esq., Ford Law Office, Harlan, KY
For Claimant

S. Parker Boggs, Esq., Buttermore & Boggs, Harlan, KY
For Employer

Thomas A. Grooms, Esq., Office of Regional Solicitor, Nashville, TN
For the Director

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et. seq.* (hereafter "the Act") filed by Claimant on September 23, 2002. There was one previous claim filed. The putative responsible operator is F & D Coal Company, Inc. ("Employer") which is insured through the Kentucky Coal Producers Self Insurance Fund ("Carrier"). Claimant is not currently receiving benefits from the Black Lung Disability Trust Fund.

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim,[1] as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also applicable, as this claim was filed after January 19, 2001. 20 C.F.R. §718.2. In *National Mining Assn. v. Dept. of Labor,* 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected the challenge to, and upheld, the amended regulations with the exception of several sections.[2] The Department of Labor amended the regulations on December 15, 2003, solely for the purpose of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments made. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

The instant claim was filed on September 23, 2002. (DX 3).[3] Claimant was examined for the Department of Labor by A. Dahhan, M.D. on November 11, 2002. (DX 8). On February 25, 2003, the District Director issued a Schedule for the Submission of Additional Evidence, which stated that Claimant would not be entitled to benefits if a decision were issued at that time and that the named coal mine operator ("F & D Coal Co Inc") was the responsible operator. (DX 16). A Proposed Decision and Order, Denial of Benefits (issued by the District Director on September 25, 2003) determined that the Claimant was not entitled to benefits because the evidence did not show that the Claimant had pneumoconiosis, that the disease was caused at least in part by his coal mine work, or that he was totally disabled by the disease. (DX 20). The District Director also found that Claimant worked as a coal miner for "10 years and 2 months, from January 1, 1968 to July 1, 1987." *Id.* The responsible operator was again identified as "F & D Coal Co Inc." *Id.* Claimant, through counsel, requested a hearing and the case was transferred to the Office of Administrative Law Judges for a hearing on December 19, 2003. (DX 21, 24).

Claimant's first claim was filed on December 6, 1989. (DX 1). In connection with that claim, Claimant was examined by Dr. Dahhan on December 21, 1989. *Id.* The claim was initially denied on May 1, 1990 because the evidence did not show pneumoconiosis, that the disease arose from coal mine employment, and that he was totally disabled by the disease. *Id.* It was finally denied on August 10, 1990 and the file was closed. *Id.* No appeal was filed.

A hearing in the above-captioned matter was held on June 9, 2005 in Harlan, Kentucky. Claimant and Employer submitted Designation of Evidence/BLBA Evidence Summary Forms.

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[1] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

[2] Several sections were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting was not upheld by the court.

[3] Director's Exhibits 1 through 24, admitted into evidence at the June 9, 2005 hearing, will be referenced as "DX" followed by the exhibit number; Claimant's Exhibits 1 through 3, also admitted, will be referenced as "CX" followed by the exhibit number; Employer's Exhibit 1 (a medical evidence summary, so marked for identification purposes) will be referenced as "EX 1"; and the hearing transcript will be referenced as "Tr." followed by the page number. Claimant's medical evidence summary has been marked as "CX 4" for identification purposes.

The Claimant was the only witness to testify. The record closed at the end of the hearing. No briefs or written closing arguments were submitted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The issues before me are existence of pneumoconiosis, its casual relationship with coal mine employment, total disability, causation of total disability, material change in conditions/subsequent claims, and dependency (DX 24, Tr. 7-8). Employer withdrew the issues of Timeliness, Miner and Responsible Operator (as well as the related issue of cumulative employment) at the hearing. (Tr. 7-8). The parties stipulated to at least 10 years of coal mine employment. (Tr. 7, 8). Additional issues (concerning the new regulations and the procedures applied thereunder) were listed for appellate purposes. (DX 24; Tr. 8).

Medical Evidence

Interpretations of chest X-rays taken on December 21, 1989, November 6, 2002, and June 20, 2003, all of which utilize the ILO system and are in compliance with the regulatory standards, are summarized below.

Exhibit No./ Party designating	**Date of X-ray/ Reading**	**Physician/ Qualifications**[4]	**Interpretation**
DX 1 (Previous Claim)	**12/21/1989** same	A. Dahhan B-reader	Completely negative. Quality 1.
DX 1 (Previous Claim)	12/21/1989 01/18/1990	[Illegible] B-reader, BCR	Pneumoconiosis 1/0, p/p, all six zones. Quality 2 [contrast, scapula].
DX 1 (Previous Claim)	12/21/1989 01/19/1990	E. Sargent B-reader, BCR	Pneumoconiosis 0/1, p/p, all six zones. "Smoking History?? Calcified aortic arch, osteoarthritis of spine." Quality 3 [illegible].
DX 8 DOL Exam	**11/06/2002** same	A. Dahhan B-reader	Completely negative. Quality 1
DX 8 DOL Exam [Quality reading]	11/06/2002 11/25/2002	A. Goldstein BCR, B-reader	Quality 3 [under exposed] [Quality Reading Only].
CX 3 Claimant Initial	11/06/2002 [miscited as 06/11/2002] 04/27/2005	B. Brandon B-reader, BCR	Pneumoconiosis 2/2, q/t, all six zones. "ca" [RUL density; rule out cancer]. Quality 1.

[4] BCR refers to a board certified radiologist. A B-reader is a physician certified by NIOSH to read x-rays.

Exhibit No./ Party designating	Date of X-ray/ Reading	Physician/ Qualifications[4]	Interpretation
DX 10 Employer Initial	**06/20/2003** 06/26/2003	G. Fino B-reader	Completely negative. Quality 1
CX 2 Claimant Rebuttal	06/20/2003 04/27/2005	M. Alexander B-reader, BCP	Pneumoconiosis 1/1, p/s, all six zones. Quality 1.

In connection with the instant claim, pulmonary function tests were taken on November 6, 2002 (DX 8, DOL Dahhan examination); and June 20, 2003 (DX 10) (Fino Examination, Employer Initial Evidence); a prior test was taken December 21, 1989 in connection iwth the Miner's first claim (not designated). Under subparagraph (i) of section 718.204(b)(2), total disability is established if the FEV1 value is equal to or less than the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix B, for the miner's age, sex and height, if in addition, the tests reveal qualifying FVC or MVV values under the tables, or an FEV1/FVC ratio of less than 55%. None of the tests produced qualifying results based upon the FEV1 values.

Arterial blood gases were taken on December 21, 1989 (DOL examination in connection with Claimant's previous claim), November 2, 2002 (DOL Dahhan examination) (DX 10), June 20, 2003 (Fino examination, Employer Initial Evidence) (DX 26), and March 18, 2005 (Mohan examination during hospitalization, Claimant Initial Evidence) (CX 2); there was no exercise testing during the latter two tests.[5] The ABGs produced the following values:

Exhibit No.	Date	Physician	pCO2	pO2	Qualifying?
DX 1 (Prior claim)	12/21/1989	A. Dahhan	34.5 (rest) 29.4 (exercise)	87.5 (rest) 98.4 (exercise)	No No
DX 8 DOL Exam	11/06/2002	A. Dahhan	28.7 (rest) 28.5 (exercise)	75.7 (rest) 90.8 (exercise)	No No
DX 10 Employer Initial	06/20/2003	G. Fino	30.3 (rest)	69.7 (rest)	Borderline
CX 1 Claimant Initial	03/18/2005	M. Mohan	30 (rest)	69 (rest)	Yes

For the instant claim, the first test was not qualifying (either at rest or exercise) under Part 718, Appendix C; the second test (rest only) was borderline; and the third test (rest only) was qualifying, although it was taken during a hospitalization. The ABGs taken at rest and exercise during the first claim were nonqualifying.

Medical opinions were rendered by three physicians:

[5] After five minutes of exercise, the December 1989 test was terminated due to fatigue and shortness of breath. (DX 1).

(1) Dr. A. Dahhan, a board certified internist with a subspecialty in pulmonary diseases, conducted the November 6, 2002 Department of Labor examination of the Claimant (DOL examination) (DX 10), and Dr. Dahhan also conducted the examination taken on December 21, 1989 in connection with Claimant's previous claim (DX 1). In a November 6, 2002 DOL form report (which provided detailed findings concerning the Claimant's history, physical findings, and test results), Dr. Dahhan found the Claimant to have coronary artery disease with angina as the sole cardiopulmonary diagnosis, and he found the Claimant to have no respiratory impairment and to retain the respiratory capacity to continue his previous coal mining work or a job of comparable physical demand. (DX 10).

In connection with the December 1989 DOL examination for the previous claim, Dr. Dahhan listed only "History of chronic bronchitis" under cardiopulmonary diagnoses and under degree of Impairment, stated "None." (DX 1).

(2) Dr. Gregory Fino, a board certified internist with a subspecialty in pulmonary diseases, examined the Claimant for the Employer on June 30, 2003 (Employer's Initial Evidence) (DX 10). His report of June 30, 2003, related to the examination he conducted on the same date, including a history and detailed physical findings. In that report, Dr. Fino stated that there was insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis or any lung disease associated with the inhalation of coal mine dust, there was no respiratory impairment present, the Claimant was neither partially nor totally disabled on a respiratory basis from returning to his last mining job or a job requiring similar effort, and even assuming that the Claimant had coal worker's pneumoconiosis, "it has not caused or contributed to any pulmonary impairment" (DX 10).

Background and Employment History

Claimant was the only witness to testify at the hearing. He indicated that he was born in April 1941 and was uneducated. (Tr. 11). His dependents consist of a daughter, age 16, who lives with him and goes to high school; however, he is separated from his wife. (Tr. 16-17, 25). He was drawing Social Security disability at the time of the hearing. (Tr. 25, 26).

Claimant discussed his employment, both coal and noncoal. (Tr. 12-). He testified that his coal mine employment spanned the time from 1961 until 1987. (Tr. 12). At F & D Coal Company, his job entailed shoveling dust on the left side of the mine, all day long. (Tr. 14). He shoveled the dust for the Wilcox, which is a coal cutting machine. (Tr. 14-15). He mainly worked for F & D and Dan Dale Coal Company, which were essentially the same company but keep on shutting down and reopening. (Tr. 24). The owner was his father's brother. (Tr. 25-26). The last time he worked it was for ten years straight. (Tr. 24). On cross examination, he indicated that he left the mines due to a back injury. (Tr. 23). He testified that he would not be able to return to his coal mine employment due to his back problems, but even if he did not have a back problem, his breathing (smothering) would prevent him from doing the work. (Tr. 27).

With respect to his breathing, Claimant stated that he had problems. (Tr. 18-19). At night, it is hard on him when it gets hot, and he has to sleep on three pillows. (Tr. 18). During the day, he gets out of breath when he walks or uses the steps. (Tr. 18). He gets short of breath

and coughs, both in the daytime and at night. (Tr. 18-19). Claimant is currently being treated by Dr. Sheilander for his breathing, and Dr. Mohan is his regular doctor. (Tr. 19-20). His medication includes a 100 milligram breathing pill and an inhaler. (Tr. 19-20). He uses the inhaler six times a day, sometimes more. (Tr. 20). The last time he was in the hospital was Pineville Hospital, about six months prior to the hearing, when he was treated for an infection in his lungs. (Tr. 20-21). In the year prior to the hearing, he went to the hospital twice. (Tr. 22).

Claimant testified that he did not currently smoke, although he smoked for many years, but it has been many years since he smoked. (Tr. 22). On cross examination, he estimated that he smoked in total less than 20 years. (Tr. 23).

Discussion and Analysis

Evidentiary Limitations

My consideration of the medical evidence is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001. 20 C.F.R. §725.414. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. *Dempsey v. Sewell Coal Co.,* 23 B.L.R. 1-47 (2004) (en banc), BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3), *citing* 20 C.F.R. §§725.414; 725.456(b)(1). Under section 725.414, the claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." *Id., citing* 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." *Id., citing* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." *Id., citing* 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." *Id., citing* 20 C.F.R. §725.456(b)(1).

The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.,* 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

The Benefits Review Board discussed the operation of these limitations in its en banc decision in *Dempsey, supra.* First, the Board found that it was error to exclude CT scan evidence

because it was not covered by the evidentiary limitations and instead could be considered "other medical evidence." *Dempsey* at 5; s*ee* 20 C.F.R. § 718.107(a) (allowing consideration of medical evidence not specifically addressed by the regulations). Second, the Board found that it was error to exclude pulmonary function tests and arterial blood gases derived from a claimant's medical records simply because they had been proffered for the purpose of exceeding the evidentiary limitations. *Dempsey* at 5. Third, the Board held that state claim medical evidence is properly excluded if it contains testing that exceeds the evidentiary limitations at § 725.414. In so holding, the Board noted that such records did not fall within the exceptions for hospitalization or treatment records or for evidence from prior federal black lung claims. *Dempsey* at 5.

In this case, the parties have complied with the evidentiary limitations.

I must also note that all admissible evidence from the 1989 prior claim is admitted into evidence as DX 1. Section 725.309(d)(1) provides that "any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." Additionally, in *Church v. Kentland-Elkhorn Coal Corp.*, BRB Nos. 04-0617 BLA and 04-0617 BLA (Apr. 8, 2005)(unpub.), the Board stated that "as noted by the Director, when a living miner files a subsequent claim, all evidence from the first miner's claim is specifically made part of the record." Therefore, all evidence relating to the prior claim is admissible.

Subsequent Claims Analysis

The instant case is a subsequent claim, because it was filed more than one year after the first denial of benefits in 1990. *See* §725.309(d). Previously, such a claim would be denied based upon the prior denial unless the Claimant could establish a material change in conditions. *See* 20 C.F.R. §725.309(d). The Sixth Circuit Court of Appeals held that to find that a material change in condition has occurred, between earlier denial of claim under the Act and subsequent claim, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner employee has proven at least one of the elements of entitlement previously adjudicated against him. *Kentland Elkhorn Coal Corp. v. Hall*, 287 F. 3d 555, 559 (6th Cir. 2002); *citing Sharondale Corp. v. Ross,* 42 F.3d 993, 997-98 (6th Cir. 1994). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. *Id.* Then the administrative law judge must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits. *Id.*

The amended regulations have replaced the material-change-in-conditions standard with the following standard:

> (d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see §725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. **A subsequent claim** shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part,

except that the claim **shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement** (see §§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) **has changed since the date upon which the order denying the prior claim became final.**[6] The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

(1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(2) For purposes of this section, **the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based.** For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) **If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.** . .

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim. . . .[Emphasis added.]

20 C.F.R. § 725.309(d) (2003). Thus, it is necessary to look at the new evidence relating to each medical condition of entitlement to determine whether it establishes that condition of entitlement.

The prior claim was denied because the medical evidence did not establish that the Claimant suffered from pneumoconiosis, that the disease arose from coal mine employment, and that he was totally disabled by the disease. (DX 1). Establishment of any of these elements would therefore reopen the claim for consideration of the merits. Thus, I must determine whether the new evidence establishes that the Claimant suffers from pneumoconiosis arising out of coal mine employment or that he is totally disabled from a respiratory or pulmonary condition within the meaning of the regulations. As the issues are essentially the same as the elements of entitlement, I will address the subsequent claims issue in the context of the elements that must be established for a Claimant to prevail on the merits of a claim. Thus, I will first determine

[6] For a miner, the conditions of entitlement include whether the individual (1) is a miner as defined in the section; (2) has met the requirements for entitlement to benefits by establishing pneumoconiosis, its causal relationship to coal mine employment, total disability, and contribution by the pneumoconiosis to the total disability; and (3) has filed a claim for benefits in accordance with this part. 20 C.F.R. §725.202(d) *Conditions of entitlement: miner.*

whether the new evidence establishes the element so as to establish a basis for reopening and then will address whether the element has been established based upon all of the evidence of record. Once an element has been established based upon the new evidence, the subsequent claims analysis is no longer relevant and the claim may be considered on the merits.

Merits of the Claim

To prevail in a claim for Black Lung benefits, a claimant miner must establish that he or she suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he or she is totally disabled, as defined in section 718.204; and that the total disability is due to pneumoconiosis. 20 C.F.R. §§718.202 to 718.204. The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Greenwich Collieries*, the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. *Id.* Thus, in order to prevail in a black lung case, a claimant must establish each element by a preponderance of the evidence.

Existence of Pneumoconiosis

The regulations (both in their original form and as revised effective January 19, 2001) provide several means of establishing the existence of pneumoconiosis: (1) a chest x-ray meeting criteria set forth in 20 C.F.R. §718.102, and in the event of conflicting x-ray reports, consideration is to be given to the radiological qualifications of the persons interpreting x-ray reports; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. §718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" set forth in 20 C.F.R. §718.304 (or two other presumptions set forth in §718.305 and §718.306); or (4) a determination of the existence of pneumoconiosis as defined in §718.201 made by a physician exercising sound judgment, based upon objective medical evidence and supported by a reasoned medical opinion. 20 C.F.R. §718.202(a) (1)-(4). Under section 718.107, other medical evidence, and specifically the results of medically acceptable tests and procedures which tend to demonstrate the presence or absence of pneumoconiosis, may be submitted and considered. At least one United States Court of Appeals (the Fourth Circuit) has held that all of the evidence from section 718.202 should be weighed together in determining whether a miner suffers from pneumoconiosis. *See, e.g., Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-209 (4th Cir. 2000). However, that rule has not been applied in the Sixth Circuit, where this case arises. *See Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (en banc) (noting "the Sixth Circuit has often approved the independent application of the subsections of Section 718.202(a) to determine whether claimant has established the existence of pneumoconiosis.")

Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. *Clark v. Karst-Robbins Coal Co*., 12 B.L.R. 1-149 (1989) (en banc); *Casella v. Kaiser Steel Corp*., 9 B.L.R. 1-131 (1986).

In the recent amendments to the regulations, the definition of pneumoconiosis in section 718.201 has been amended to provide for "clinical" and "legal" pneumoconiosis and to acknowledge the latency and progressiveness of the disease. Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconiosis, such as coal worker's pneumoconiosis or silicosis. Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a). The regulation further indicates that a lung disease arising out of coal mine employment includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

X-Ray Evidence. The x-ray evidence submitted in connection with the instant case is summarized above. Of four substantive x-ray readings of the two new x-rays, two readings were positive for pneumoconiosis and two were negative for pneumoconiosis; however, the two positive readings were made by better qualified readers. In this regard, putting aside the quality only reading, the November 6, 2002 x-ray was read as positive by a dually qualified reader (who is qualified as both a B-reader and a board certified radiologist), while it was read as negative by a B-reader. Similarly, the June 20, 2003 x-ray was read as positive for pneumoconiosis by a dually qualified reader and as negative by a B-reader. Thus, when the radiological qualifications of the reader are taken into account, the preponderance of the "new" x-ray evidence establishes the existence of clinical pneumoconiosis. Thus, Claimant has established a basis for reopening the claim and the subsequent claims analysis is no longer relevant.

When I take into account all of the x-ray evidence of record, I reach the same conclusion. At the time of the previous claim, a December 21, 1989 x-ray was taken that was interpreted as completely negative by one B-reader, as positive for pneumoconiosis by a dually qualified reader, and as "0/1" (which does not qualify as evidence of pneumoconiosis under 20 C.F.R. §718.102) by another dually qualified reader. Excluding the "0/1" reading, which is neither evidence of pneumoconiosis nor evidence of the absence of pneumoconiosis, I again find that the reading by the reader with superior qualifications was positive for the disease. Thus, all three x-rays may reasonably be interpreted as positive for pneumoconiosis when the radiological qualifications of the readers are taken into consideration. Claimant has therefore met the preponderance of the x-ray evidence standard, and Claimant has established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1).

Autopsy or Biopsy Evidence. There is no pathological evidence of record. I therefore find that the Claimant has not established that he suffers from pneumoconiosis under 20 C.F.R. §718.202(a)(2).

Complicated Pneumoconiosis and Other Presumptions. A claimant can also demonstrate pneumoconiosis presumptively under section 718.202(a)(3). A finding of opacities of a size that would qualify as "complicated pneumoconiosis" under 20 C.F.R. §718.304 results in an irrebuttable presumption of total disability. There is no evidence of complicated pneumoconiosis, so the section 718.304 presumption is inapplicable. The additional presumptions described in section 718.202(a)(3), which are set forth in 20 C.F.R. §718.305 and 20 C.F.R. §718.306, are also inapplicable, inter alia, because they do not apply to claims filed

after January 1, 1982 or June 30, 1982, respectively. Further, section 718.306 only applies to deceased miners. Thus, Claimant has failed to establish the presence of pneumoconiosis under 20 C.F.R. §718.202(a)(3).

Medical Opinions on Pneumoconiosis. On the issue of legal pneumoconiosis, I note that the medical opinions of two physicians, Dr. Fino and Dr. Dahhan, are of record. Inasmuch as neither physician diagnosed legal pneumoconiosis, Claimant cannot establish that he suffers from legal pneumoconiosis as well as clinical pneumoconiosis based upon the medical opinion evidence. In reviewing these opinions, I note that each physician discounted a diagnosis of clinical pneumoconiosis as well; however, both Drs. Fino and Dahhan relied upon their own x-ray readings which were at variance with the readings of more qualified readers. In any event, the Claimant has failed to establish the presence of pneumoconiosis under 20 C.F.R. §718.202(a)(3).

Other Evidence of Pneumoconiosis. There is no other evidence of record relevant to the issue of pneumoconiosis. See 20 C.F.R. §718.107.

All Evidence on Pneumoconiosis. Taking into consideration all of the evidence on the issue of the existence of pneumoconiosis, I find that the Claimant has established clinical pneumoconiosis based upon the x-ray evidence, reviewed in the context of the other evidence of record. Claimant has not, however, established legal pneumoconiosis.

Causal Relationship with Coal Mine Employment

Because Claimant has been credited with over ten years of qualifying coal mine employment, there is a presumption that his pneumoconiosis arose out of his coal mine employment. 20 C.F.R. § 718.203(b). The presumption has not been rebutted.

Total Respiratory Disability

The regulations as amended provide that a claimant can establish total disability by showing pneumoconiosis prevented the miner "[f]rom performing his or her usual coal mine work," and "[f]rom engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." 20 C.F.R. §718.204(b)(1). Where, as here, there is no evidence of complicated pneumoconiosis, total disability may be established by pulmonary function tests, arterial blood gas tests, evidence of cor pulmonale with right sided congestive heart failure, or physicians' reasoned medical opinions, based on medically acceptable clinical and laboratory diagnostic techniques, to the effect that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in the miner's previous coal mine employment or comparable work. 20 C.F.R. §718.204(b)(2). For a living miner's claim, it may not be established solely by the miner's testimony or statements. 20 C.F.R. §718.204(d)(5).

According to his testimony and written submissions, Claimant's primary and last coal mine employment involved shoveling dust and setting the jacks after a Wilcox miner, and he also

worked sporadically running the cutting machine and roof bolting. (DX 1). The heaviest weight he was required to lift or carry at that job was 40 pounds. *Id.* Claimant's job description must be considered in light of the medical evidence. Based upon the newly submitted evidence, Claimant has not established total disability under §718.204(b).

Pulmonary Function Tests As summarized above, none of the new pulmonary function tests produced qualifying values. *See* 20 C.F.R. §718.204(b)(2)(i). Accordingly, I find that the pulmonary function tests do not support a finding of total disability under §718.204(b)(2)(i).

Arterial blood gases. Of the three arterial blood gases taken on November 6, 2002, June 20, 2003, and March 18, 2005, one was nonqualifying either at rest or on exercise, one was borderline qualifying at rest, and the third was qualifying at rest. The readings taken at rest and during exercise on December 21, 1989, in connection with the previous claim, were nonqualifying. Thus, I find the arterial blood gas evidence is in equipoise and Claimant has also failed to establish total disability through arterial blood gas studies under §718.204(b)(2)(ii).

Cor pulmonale with right-sided congestive heart failure. There is no evidence of cor pulmonale or congestive heart failure, so Claimant has not established total disability under section 718.204(b)(2)(iii).

Medical opinion evidence on total disability. I also find that Claimant has not established total disability through reasoned medical opinions. As summarized above, Drs. Dahhan and Fino submitted opinions on the issue of total respiratory disability. Both physicians determined that the Claimant was not disabled from a respiratory standpoint from performing his work as a coal miner. In fact, each found no respiratory impairment. Their opinions are unrefuted. Significantly, both physicians are highly qualified as board-certified pulmonologists and they each had the opportunity to examine the Claimant, review his coal mining history, and interpret pertinent clinical tests. Accordingly, Claimant has not established total disability under section 718.204(b)(2)(iv).

Furthermore, considering the issue of total disability in the context of the Claimant's testimony concerning his coal mine employment and other evidence of record, I find that he has failed to establish that he cannot perform his last coal mine employment. Although the arterial blood gas evidence was equivocal, the other evidence does not support any respiratory or pulmonary disability. Specifically, Dr. Dahhan found no respiratory impairment and Dr. Fino reached the same conclusion and each determined that the Claimant could perform his last coal mine employment on a respiratory basis. These physicians had the benefit of reviewing clinical test results, including the ABGs, and they had the opportunity to question the Claimant concerning his coal mine employment. Accordingly, I find that the evidence of record establishes that the Claimant is capable of performing his last or usual coal mine employment on a respiratory basis. He cannot therefore establish total disability.

CONCLUSION

Although he has established that he suffers from clinical pneumoconiosis based upon the x-ray evidence and has established a basis for reopening this subsequent claim, Claimant cannot

establish total disability, a necessary element of a claim for benefits under the Black Lung Benefits Act. Accordingly, this claim must be denied and it is unnecessary to address the remaining issues.

ORDER

IT IS HEREBY ORDERED that the claim of J. S. for black lung benefits under the Act be, and hereby is, **DENIED.**

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed. At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen H. Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).